

permanently and totally disabled. However, it is the respondent's position that claimant's current condition is not the result of the injuries she suffered on September 13, 1999. Respondent argues that the deterioration of claimant's condition was the result of the natural aging process or normal activities of day-to-day living. In the alternative, respondent further argues claimant's continued self-employment activities as well as caring for her aged mother after her work-related injury resulted in aggravation, intensification and acceleration of her condition. Consequently, respondent argues claimant suffered an intervening injury.

Conversely, the claimant argues the evidence establishes that her condition has worsened as a result of the injuries suffered September 13, 1999, and the ALJ's Review & Modification of an Award should be affirmed.

The sole issue for Board review is whether claimant is permanently and totally disabled as a result of her September 13, 1999 work-related injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant suffered a work-related injury to her cervical spine on September 13, 1999. The ALJ entered an Award on November 1, 2001, finding claimant suffered a 73 percent work disability. On October 24, 2002, the Board affirmed the ALJ's Award. On July 11, 2005, claimant filed for review and modification pursuant to K.S.A. 44-528. On March 6, 2006, the ALJ granted claimant's request for modification to a permanent total disability.

It is undisputed that claimant is now permanently and totally disabled. It is disputed whether her condition worsened as a natural and probable consequence of her work-related injury.

For several years prior to her accident, claimant had engaged in part-time, income-producing activities apart from her employment with respondent. She was paid \$7 an hour for 14 hours a week by RCIL, a home health agency, for assisting in the care of her 80-year-old mother. She also was the sole owner and operator of a private establishment called the Unique Boutique. This business consisted primarily of the rental of formal wear for weddings and proms.

The claimant noted that she discontinued searching for employment in 2001 because she did not feel she could work because of her ongoing pain and physical

limitations. Claimant continued to engage in her part-time work activities although she eventually had to cut down her hours at her store because of the ongoing pain from her injury. Claimant noted that she initially had an employee at her store but with reduced hours she could not afford the employee. But she did have a friend help with the lifting during the prom season as she continued to operate her business. The claimant noted that as her neck condition worsened it became impossible for her to continue to care for her mother and in November 2002 her mother was placed into a care facility. And claimant closed the Unique Boutique in May 2003 as her condition worsened to the point that she could not place or remove clothing from the racks nor raise her arms above shoulder level.

Dr. David A. Schmeidler, board certified in family practice, was a treating physician for claimant after her work-related September 13, 1999 injury. Claimant has continued to receive treatment through 2005, including periodic physical therapy, for her chronic cervical neck and shoulder pain. The episodic referrals to physical therapy were to relieve spasms and pain in claimant's neck from her chronic cervical neck injury. The doctor noted that over the years of continued treatment although claimant's objective findings have not changed much her muscles have stiffened with a loss of strength. In a letter to claimant's counsel dated June 29, 2005, the doctor explained the claimant's worsened physical condition was the result of the injury suffered working for respondent. The doctor noted in pertinent part:

Susie's physical condition has deteriorated as she has aged. Bones become weaker and muscles become more stiff. Ligaments become more stiff so she continues to have problems with chronic neck pain and radiculopathy. Yes, this was the result of the injury she suffered while employed at Montgomery KONE.¹

The doctor further noted that he had imposed more limited physical restrictions for claimant than imposed in 2001. Finally, the doctor concluded claimant could no longer perform even sedentary employment and she is realistically unemployable.

On cross-examination, Dr. Schmeidler was asked if the work activities claimant performed caring for her mother and at her business would have accelerated her physical deterioration. The doctor was then asked to look at the report prepared by Jim Molski, introduced at his deposition, which allegedly described claimant's work at Unique Boutique and RCIL.² The doctor opined that claimant's activities caring for her mother would not have hastened the deterioration of claimant's condition. But the doctor noted that if claimant lifted 50 pounds at her own business that could aggravate her condition and if

¹ Schmeidler Depo., Ex. 1.

² The pages of Mr. Molski's report provided to Dr. Schmeidler during cross-examination were not offered as an exhibit at that deposition.

performed constantly it would hasten deterioration of her condition. On its face this latter comment supports respondent's argument that claimant's work activities after her work-related injury could constitute an intervening injury. However, a review of Mr. Molski's report introduced at his deposition on March 8, 2000, does not support the doctor's inference that claimant lifted 50 pounds at her own business. The only reference to lifting 50 pounds was a general statement that claimant had the ability to occasionally lift 50 to 60 pounds before her accident. More significantly, in the development of the task list for the tasks claimant performed at her own business, Mr. Molski noted claimant would generally lift no greater than 20 pounds but when stocking products claimant would lift between 15 and 40 pounds. Consequently, the record does not establish that claimant lifted 50 pounds in her work activities at her store nor that she performed constant lifting. Moreover, claimant stated that she had a friend perform the heavy lifting for her after the injury.

In *Logsdon*³ the Kansas Court of Appeals noted that in the determination whether an injured worker's condition is a natural consequence of the primary injury or a new and distinct injury a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury. Claimant's testimony, corroborated by Dr. Schmeidler's treatment records, establishes that after the initial cervical spine injury the claimant continued to receive periodic treatment through 2005 approximately every other month for her chronic cervical pain due to her work-related injury. More significantly, where the passage of time causes deterioration of a compensable injury, the resulting disability is compensable as a direct and natural result of the primary injury.⁴ Dr. Schmeidler affirmatively stated the deterioration of claimant's condition was the result of her work-related injury with respondent. Respondent did not establish claimant's limited work activities after her injury accelerated her deterioration. Claimant has met her burden of proof that she is permanently and totally disabled as a natural and probable consequence of her work-related injury on September 13, 1999.

AWARD

WHEREFORE, it is the decision of the Board that the Review & Modification of an Award of Administrative Law Judge Nelsonna Potts Barnes dated March 6, 2006, is affirmed.

IT IS SO ORDERED.

³ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

⁴ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

SHIRLEY S. WHITE

DOCKET NO. 258,814

Dated this _____ day of August 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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